that the prosecution evidence would have been unchanged (substantially) and the accused's evidence the same."

Cussen J. has clearly laid down some tests which must be satisfied before the power to alter or substitute can be exercised and the reasons for exercising great caution are obvious. They can be gathered from what we have to say shortly.

Our law clearly allows the Judge of a High Court in an appeal against conviction to alter a finding. Section 316(b) provides that power. This is consistent with section 26 of the Courts of Judicature Act which states that the appellate criminal jurisdiction of the High Court shall consist of the hearing of appeals from Subordinate Courts according to any law for the time being in force within the territorial jurisdiction of the High Court. Certain provisions of the Criminal Procedure Code general in nature are also relevant for purposes of hearing such appeals. Sections 166 and 167 of the Criminal Procedure Code are examples of such provisions. In hearing an appeal from a conviction the power of the judge to alter a finding must in our view be exercised subject to sections 166 and 167 of the Criminal Procedure Code.

The requirements of sections 166 and 167 of the Criminal Procedure Code must be satisfied before a High Court in the exercise of its appellate jurisdiction alters or substitutes a conviction for a different offence. Although therefore an appellate court is possessed of the power which it can lawfully exercise, it is equally essential that such power be exercised within the confines of the law. The question is to what extent and under what circumstances such power can be invoked. What is clear in our minds is, and we emphasise, that such power must be exercised under limited circumstances and with great caution subject to the restriction imposed by section 167 of the Criminal Procedure Code, and it must be done so as not to prejudice the case of an accused.

In our view *Ng Ee's* case was correctly decided and to warrant a substitution there must be clear evidence that a case for the substituted offence would have been made out or established against the accused in the court below. To put it in another way before there can be an alteration of a finding the appellate court must be satisfied that if the substituted charge had in fact been the original charge, the proceedings at the trial would have taken the same course, and the evidence recorded have been same. Further, if the substituted charge was one of the charges preferred against the accused or was an alternative charge the prosecution evidence would have been sufficient to satisfy the elements to constitute the charge and the accused's evidence must have been substantially unchanged in that the accused's defence would have been the same.

We hasten to observe that we are not dealing with the question of amendment of the charge by a Judge on appeal. We do not therefore see any necessity to deal with *Yoong Hock Pin* v. *Public Prosecutor*[4]. In this regard we do not consider section 158 and section 162 of the Criminal Procedure Code referred to in the question reserved relevant to the determination of the question. Section 158 deals with the power of the court to alter or add to any charge at any time before judgment is pronounced and as such cannot apply to the issue at hand which essentially is related to and concerned with the question of the power of the High Court in the exercise of its appellate jurisdiction. Section 162 is a consequential provision dealing with recall of witnesses after an alteration of a charge.

In the light of the foregoing we are of the view that while, there is power of a High Court on appeal to alter or substitute a finding the question posed before us must be answered in the negative. We find that the learned Judge had erred in law in substituting a conviction for another charge for clearly this case did not come within the confines of section 166 and section 167 of our Criminal Procedure Code.

The applicant was charged with only an offence of cheating under section 420. To warrant a conviction under section 409 of the Penal Code there must be evidence that he committed a different offence, i.e. section 409. The law is clear. It is the necessary ingredients of a charge under section 409 of the Penal Code that an accused must either be a public servant, banker, merchant, etc. and that he must have been entrusted with property in his capacity of such public servant, banker, etc. Strictly it means that the ingredients required to prove an offence under section 409 of the Penal Code are not exactly the same as those under section 420. These ingredients were not in the case under consideration required to be proved by the prosecution to establish a case under section 420 and for this reason the President Sessions Court was never called upon to consider whether these elements were satisfied. On the materials before us there is nothing to show that the learned Judge considered whether these elements were established.

In our judgment the substitution of a conviction under section 409 of the Penal Code cannot be said to have been validly made having regard to the circumstances of this case and on the evidence before the High Court.

Following *Yoong Ho Pin's* case we have to go beyond answering the question of law posed by ordering that the conviction substituted by the learned Judge without restoring the conviction under section 420 of the Penal Code and the sentence be set aside.

Appeal allowed.

Solicitors: *Jagjit Singh & Co.*

M.R.K. NAYAR v. PONNUSAMY & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Abdul Hamid F.JJ.) March 9 & May 22, 1982]
[Johore Bahru – Federal Court Civil Appeal No. 290 of 1980]

Practice and Procedure – Interlocutory Injunction – Material facts not disclosed – Discretion of court – Injunction dissolved.

In this case the respondents had agreed to buy a piece of land from the owners. Subsequently the respondents entered into a joint venture agreement with the appellant and Liew Sin. The appellant and Liew Sin offered to buy the respondents out but the respondents refused. There was a delay in the subdivision of the land and so the allotment of the land could not be carried out. Liew Sin assigned his interests to the appellant and the appellant lodged a caveat against the land and sued the respondents. He then obtained an interlocutory injunction to restrain the respondents from selling

or otherwise disposing of the land. The respondents applied for the injunction to be dissolved and contended that the appellants had misled the court by not disclosing all the material facts when obtaining the injunction. The learned Judge considered the appellant to have misled the court in respect of the following material facts:–

"(1) He had taken back his collateral security from the Bank of his land title Mukim of Sidam Kanan No. MG 41 State of Kedah on April 19, 1977 (P. 50 Bundle of Documents) without informing the defendants or the other guarantors.

(2) He had taken $70,000/- representing his rateable contribution towards the loan of $350,000/- from the Bank immediately upon the loan having been approved.

(3) He had already entered caveats in respect of all the lands before he filed his motion for injunction."

He therefore dissolved the injunction granted. The appellant appealed.

Held: (1) where an interlocutory injunction is sought the balance of convenience will be the overriding consideration. Once the learned judge was satisfied that there was suppression of facts the question of balance of convenience did not arise for consideration;

(2) in this case even if the learned Judge was wrong in regard to item (2) of the matters stated by him, the appellant had failed to show that the learned judge was wrong in respect of either item (1) or (3). The appeal must therefore be dismissed..

Cases referred to:–

(1) *American Cyanamid Co.* v. *Ethicon* [1975] A.C. 396.
(2) *Stables & Co. Ltd.* v. *Corby* (1900) 19 N.C.L.R. 517, 519
(3) *Public Trustee* v. *Murray* (1922) 22 S.R.N.S.W. 555.
(4) *Walsh* v. *Alexander* (1913) 16 C.L.R. 293, 306.

FEDERAL COURT.

E. Masacorale (*V. Arunachalam* with him) for the appellant.

S. Patmanathan (*S. Sagadeva* with him) for the respondents.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): This appeal is against the decision of Mohamed Yusoff bin Mohamed, J. made on November 23, 1980 dissolving the injunction granted by Anuar, J. on April 27, 1980 restraining the 2nd and 3rd respondents/ defendants from selling or otherwise disposing of nine pieces of land in the Mukim of Pulai in the District of Johore Bahru, Johore ("the land").

In order to buy "the land" and subdividing them into smaller lots and selling them to members of the Indian community in the Scudai area respondents negotiated with the owners, Messrs. Lian Hup Soon Development Sdn. Bhd. in September, 1975. On November 29, 1975 they entered into an agreement of sale whereby the respondents agreed to purchase "the land" for $560,927.50 by paying a deposit of $56,092.75 being 10% of the purchase price. The respondents were expected to pay the balance of the purchase price on or before March 9, 1976. As the respondents had not sufficient funds they got in touch with Liew Sin to assist them in obtaining a loan. He put them in touch with the appellant/ plaintiff. On October 7, 1975 the appellant encouraged them by promising to help. As they were in need of funds to pay for "the land" they had no choice but to enter into a joint venture agreement with the appellant and Liew Sin on December 10, 1975 on 50-50 basis. With the result "the land" was charged to Bank Buruh in the sum of $350,000.00 on March 9, 1976 which was arranged by the appellant. All the parties stood as guarantors for the repayment of the bank loan. Disagreements between the parties caused strained relationship resulting in the termination of all connection on September 5, 1979 when the respondents changed their solicitors.

The respondents wrote through their solicitors asking the appellant to repay them a loan of $32,000.00. The latter paid $30,000.00 and later another $2,000. On September 19, 1979 the appellant and Liew Sin offered to buy the respondents out for $350,000.00. The respondents refused to sell out. They settled the bank loan on November 30, 1979.

Because of Government policy the application for subdivision met with some difficulties. Approval for subdivision for large property would be subject to 30% Bumiputra participation and 40% of all buildings are to be low cost houses to be allotted by the Government. This cast a different light on the agreement entered into by the parties on December 10, 1975.

By a Deed of Assignment dated January 28, 1980 Liew Sin purported to assign all his interests arising out of the agreement of December 10, 1975 to the appellant. On February 12, 1980 the appellant lodged a caveat against "the land" and sued the respondents on April 22, 1980. He then obtained an interlocutory injunction against the 2nd and 3rd respondents on April 27, 1980. By a notice of motion dated May 19, 1980 the respondents applied for the injunction to be dissolved. In their joint affidavit supporting the motion they pointed out that they had entered into agreement with various purchasers some five years ago and unless steps were taken to allot land to them or to reach agreement in an amicable way the respondents would be in breach of agreement with the purchasers. The appellant was aware of all these yet he lodged a caveat and obtained an injunction when the respondents were trying their best to fulfil the conditions laid down by the authorities and to proceed with developing "the land".

Before the learned Judge the respondents contended that the appellant had misled the court by not disclosing all material facts when obtaining the injunction. The learned Judge considered the appellant to have misled the court in respect of the following material facts:–

"(1) He had taken back his collateral security from the Bank of his land title Mukim of Sidam Kanan No. MG 41 State of Kedah on April 19, 1977 (P.50 Bundle of Documents) without informing the defendants or the other guarantors.

(2) He had taken $70,000/- representing his rateable contribution towards the loan of $350,000/- from the Bank immediately upon the loan having been approved.

(3) He had already entered caveats in respect of all the lands before he filed his motion for injunction."

There is no substance in the contention that the learned Judge overlooked the fact that the injunction originally obtained was *inter partes* application just because he had not mentioned it in his judgment. It is the contention of the appellant that all material facts have been disclosed. He pointed out nowhere in the respondents' joint affidavit was it stated that any fact had been concealed or suppressed when they applied for the injunction to be dissolved. With reference to the three facts mentioned by the learned Judge the appellant pointed out that (3) was disclosed to Annuar, J. As to (2) it was submitted that the learned Judge misapprehended the

position. It was a loan not a rateable contribution. This was conceded by counsel for the respondents. As to (1) the appellant did not dispute that the title deed was placed as collateral security but the Bank later released it. Because the appellant assisted the respondents in obtaining loan for the purchase of "the land" he considered himself to be entitled to a piece of the cake. Appellant made the point that the facts stated by the learned Judge were actually not material facts and irrelevant to the application. He contended that even if his affidavits did not state all the facts the learned Judge was not justified in dissolving the injunction. Further, his contention is that it is not open to an appellate court to substitute its discretion for that of the lower court. The injunction should remain to maintain the *status quo*. In answer the respondents said that the appellant did not mention a collateral security was given. The respondents were misled into thinking that the appellant had given a collateral security when in fact he did not do so. The title referred to another piece of land altogether. That was the piece of land which the appellant alleged to have given as collateral. The securities discharged by Bank Buruh on receipt of the redemption sum were "the land" and no other additional security as stated in the Bank's letter dated July 11, 1980. (See page 222 of the Appeal Record).

In paragraph 6 of his second affidavit (page 92 of the Appeal Record) the appellant stated:–

"6. I did arrange for and raise the said Bank Loan at my own expense as agreed under the said Joint Venture Agreement. In addition to the Charge of the said lands, the said Liew Sin and I stood as the Guarantors for the repayment of the said loan; further I had to and did provide by way of additional collateral security a third party's title deeds relating to his lands under Mukim Register – Mukim of Sidam Kanan No. MG 41 and situate in the State of Kedah."

In reply to appellant's inquiries Bank Buruh in their letter dated August 23, 1980 (page 226 of the Appeal Record) stated, *inter alia*, as follows:–

"Apart from the charge on the properties mentioned in our letter of July 11, 1980, we do not hold any other charges or charge on property known as Mukim of Sidam Kanan No. MG 41 State of Kedah."

What was said in the appellant's 2nd affidavit as material fact was never raised before Anuar, J. in the appellant's 1st affidavit. Regarding the caveat the respondents stated that the appellant did not raise the question of caveat. It was the respondents' counsel who stated that there was a caveat. Then the appellant's counsel said the caveat was for registration. In answer to the appellant's submissions the respondents contended that whether the application was *inter partes* or *ex-parte* all material facts must be placed before the court. The applicant must actively bring up the material facts himself.

In his letter (pages 37-39 of the Appeal Record) attached to his first affidavit affirmed on April 10, 1980 the appellant, according to the respondents, quantified his claim in these words:–

"In order to comply with the government policy in the subdivision of land in Johore State and in order to finalise this matter Mr. M.D. K. Nayar and Mr. Liew Sin have instructed me that they are prepared to consider offering a sum of not exceeding $300,000.00 to you and your partners in the purchase of your shares in the partnership and your interests in the land. In making this offer, they are also prepared to accept the benefits, rights and interests of the purchase agreements entered into with the purchasers of the sublots in the land and likewise be responsible for all obligations and liabilities under the said agreements. They will also be responsible to settle the redemption sum due and obtain a discharge of charge of the 9 pieces of land from Bank Buruh (Malaysia) Berhad.

The fresh application in respect of the said piece of land by way of surrendering and realienation will therefore be resubmitted by them in the event you agree to the above offer. All future expenses and profits will therefore be entitled to by them."

In paragraph 5 of his affidavit (page 16 of the Appeal Record) the appellant stated:–

"5. Notwithstanding the terms and conditions of the said Agreement as aforesaid, the Defendants have deliberately and/or wilfully failed, refused and/or neglected to allow me and/or the said Liew Sin to participate in the said project and have also failed, refused and/or neglected to furnish us all information and accounts required by them relating to the said project, despite several demands made therefor."

According to the respondents the above statement was not only not true but also misleading. This is clear by reading the appellant's letter dated November 3, 1979:–

"This matter has at all times since the signing of the Agreement of December 10, 1975 been conducted after consultation between all the parties relating to all the steps which have been taken. The inability to secure approval was not through the fault of any party but the sole failure on the part of the government insisted on full compliance of their policy on subdivision and realienation i.e.

1) 30% Bumiputra participation in the applicant company,
2) Low cost housing to be provided within the housing scheme."

Again, referring to the Schedule of Short Particulars of Claim (page 97 of the Appeal Record) attached to the appellant's affidavit affirmed on June 25, 1980 it is stated:–

"Major portion of the said amount has been utilised towards payment of the purchase price of the said lands. 22(B) As there is a vast difference in areas of plots between the plan originally submitted (whereunder the said lots were sold to the said purchasers) and the amended plan which has recently been submitted by the Defendants, serious disputes are bound to arise . . . . . ".

Yet the appellant, through his solicitors, concluded the letter (page 38 of the Appeal Record) referred to earlier as follows:–

"My clients' offer shall be valid for a period of two (2) weeks. In the event you accept this offer on the above terms, kindly let me have a Statement of Account in respect of the outstanding liabilities which has up to date not been disclosed in respect of the 9 pieces of land. As for the payments due by the various purchasers under the Sale Agreement, my clients do not require an account from you as all payments so made by the subpurchasers in respect of their lots, if made through this office can be accounted for."

On the facts it is not surprising that the learned Judge expressed the view that the appellant had failed to disclose in his affidavit all the material facts relevant to the application for injunction against the defendants, but made known to the court only when he was confronted. Where an interlocutory injunction is sought, the balance of convenience will be the overriding consideration: *American Cyanamid Co.* v. *Ethicon.*[1] Once the learned Judge was satisfied that there was suppression of facts the question of balance of convenience does not arise for consideration.

On the allegation that specific performance could not be sustained under the provisions of the Specific Relief Act and therefore injunction could not be granted we agree with the learned Judge that these are matters to be decided at the proper trial. Similarly, whether compensation was sufficient because it was quantified should also be decided at the trial itself.

It is true that injunction can be applied in addition to caveat. See *Stables & Co. Ltd.* v. *Corby*,[2] *Public Trustee*

v. *Murray*,[3] and *Walsh* v. *Alexander*.[4] But, as the learned Judge said in concluding his judgment that:—

"It has been held that the granting of an injunction is a discretion of the court. It is essential that the party seeking such a relief makes available to the court all facts material to the court before exercising its discretion. In my view, the plaintiff in suppressing facts at 1, 2 and 3 above had not come to court with clean hands. In principle, an injunction being an equitable remedy may not be extended to the plaintiff under those circumstances."

Even if the learned Judge was wrong in (2) the appellant has failed to convince us that the learned Judge was wrong in respect of either (1) or (3).

Accordingly, we would dismiss the appeal with costs. Deposit to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Sault & Co.; Patmanathan & Co.*

TAN SRI HAJI OTHMAN SAAT v. MOHAMED BIN ISMAIL

[F.C. (Raja Azlan Shah C.J., Wan Suleiman F.J. and Abdoolcader J.) May 20 & 25, 1982]
[Kuala Lumpur – Federal Court Civil Appeal No. 187 of 1981]

Administrative Law – Declaration – Validity of alienation of State land – Locus standi of plaintiff – Whether plaintiff has real interest in suit – Specific Relief Act (Act 137) s. 41 – R.H.C. 1980, 0.15 r. 16.

Practice and Procedure – Action for declaration – R.H.C. 1980, 0.15 r. 16.

The respondent and 183 other persons had applied for land in Mersing, Johore but with no response for some eight years. The respondent learnt that land in the area had been alienated to a number of people, including the appellant, who was at all material times the Menteri Besar of the State of Johore and other personages in the upper echelon of the administrative service. The respondent applied for declarations basically impugning the validity of the alienation of the land and named as respondents thereto the State Director of Lands and Mines and the Government of the State of Johore in addition to the appellant. The appellant applied to have the proceedings struck out primarily on a challenge to the respondent's standing to sue and also on certain procedural objections. The appellant's application was dismissed in the High Court, see [1982] 2 M.L.J. 133, and he appealed to the Federal Court on the issue of the respondent's *locus standi*.

Held: (1) although counsel for the respondent indicated in the court below that he was proceeding under section 41 of the Specific Relief Act, the statutory provision could not apply as no entitlement of the respondent to any legal character or status or right to property or the denial thereof was in issue. The declarations could be sought under Order 15 rule 16 of the Rules of the High Court, 1980;

(2) although it is not necessary for a plaintiff who seeks relief by way of declaratory judgment to show that he has a present cause of action, he must be somebody with such an interest in the subject-matter of the action as to justify his seeking relief;

(3) the respondent in this case was alleging an abuse of power and he sought to impugn the validity of the alienation of the land in question to the appellant. This was a clear case of a person having a special or substantial interest in the subject-matter of the proceedings he had instituted and whose legal interests were particularly affected. This clearly gave him capacity to sue and there could be no justification in debarring him from doing so.

Cases referred to:

(1) *Supreme-General Films Exchange Ltd.* v. *His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and Ors.* A.I.R. 1975 S.C. 1810.

(2) *Vemareddi Ramaraghava Reddy & Ors.* v. *Konduru Seshu Reddy & Ors.* A.I.R. 1967 S.C. 436.

(3) *Fischer* v. *Secretary of State for India in Council* (1899) 26 I.A. 16.

(4) *Partab Singh* v. *Bhabuti Singh* (1913) 40 I.A. 182.

(5) *Lim Cho Hock* v. *Speaker, Perak Legislative Assembly* [1979] 2 M.L.J. 85, 87.

(6) *Wilson, Walton International (Offshore Services) Ltd.* v. *Tees & Hartlepools Port Authority* [1969] 1 Lloyds L.R. 120, 124.

(7) *Stockwell* v. *Southgate Corporation* [1936] 2 All E.R. 1343, 1351.

(8) *Boyce* v. *Paddington Borough Council* [1903] 1 Ch. 109, 114.

(9) *Gouriet & Ors.* v. *Union of Post Office Workers* [1978] A.C. 435, 513, 518.

(10) *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade Ltd.* [1921] 2 A.C. 438, 448.

(11) *Forster* v. *Jododex Australia Proprietary Ltd.* (1972) 127 C.L.R. 421, 438.

(12) *Australian Conservation Foundation Incorporated* v. *Commonwealth of Australia & Ors.* [1980] 28 A.L.R. 257, 268, 276, 284.

(13) *Onus & Anor* v. *Alcoa of Australia Ltd.* [1981] 36 A.L.R. 425.

(14) *Mills* v. *Avon & Dorset River Board* [1955] Ch. 341.

(15) *Croudace* v. *Zobel* [1899] A.C. 258, 261.

(16) *Booth & Co. International Ltd. & Ors.* v. *National Enterprise Board & Ors.* [1978] 3 All E.R. 624.

(17) *Lim Cho Hock* v. *Government of the State of Perak & 2 Ors.* [1980] 2. M.L.J. 148, 149-151.

(18) *Johnco Nominees Proprietary Ltd.* v. *Albury-Wodonga (N.S.W.) Corporation* [1977] 1 N.S.W.L.R. 43.

(19) *Blackburn* v. *Attorney-General* [1971] 1 W.L.R. 1037.

(20) *Regina* v. *Greater London Council, Ex parte Blackburn* [1976] 1 W.L.R. 550.

(21) *Regina* v. *Metropolitan Police Commissioner, Ex parte Blackburn, The Times*, 7th March 1980.

(22) *Regina* v. *Horsham Justices, Ex parte Farquharson and Anor.* [1982] 2 W.L.R. 430, 446.

(23) *Inland Revenue Commissioners* v. *National Federation of Self-Employed and Small Businesses Ltd.* [1981] 2 W.L.R. 722, 737, 740.

FEDERAL COURT.

C.K.G. Pillay for the appellant.

G.S. Nijar (*Abdul Razak Ahmad* and *Mohideen Abdul Kader* with him) for the respondent.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): The short but pivotal point raised for determination in this appeal relates to the capacity of the respondent to institute and maintain the proceedings instituted by him in this matter. This involves the question of his *locus standi* or standing to sue, *scilicet*, whether the instigator of an action has the right to bring the mechanism of the court into operation.

The Basic Facts

The respondent (and the court has been constantly reminded in these proceedings of his vocation as a fisherman though what his piscatorial pursuit has got to do with his standing to sue is beyond us) and 183 other persons applied in May, 1972 for State land in Sekakap, Mersing in the State of Johore but with no response for some 8 years. It then came to his knowledge, and this is borne out by an official search, that some time in 1976 land in that area had in fact been alienated to more than 100 people, the majority of whom are not resident in Mersing, including